



REPUBLIC OF KENYA



**KENYA LAW**  
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**ARM Cement PLC (In Liquidation v Transfleet Limited (Civil Appeal E209 of 2025) [2025] KEHC 12229 (KLR) (Civ) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12229 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E209 OF 2025**

**TW CHERERE, J**

**MAY 22, 2025**

**BETWEEN**

**ARM CEMENT PLC (IN LIQUIDATION ..... APPELLANT**

**AND**

**TRANSFLEET LIMITED ..... RESPONDENT**

**RULING**

“A stay of execution is an equitable remedy granted to preserve the subject matter of an appeal, not to shield a judgment debtor from lawful recovery.”

1. By a Notice of Motion dated 13<sup>th</sup> March 2025, brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, the Appellant, ARM Cement PLC (In Liquidation), seeks the following orders:
  1. A stay of execution of the judgment delivered on 27<sup>th</sup> January 2025 in Milimani MCCC E1422 of 2022 pending the hearing and determination of the appeal;
  2. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn on 13<sup>th</sup> March 2025 by Ellam Kweya, the Appellant’s Assistant Credit Controller.
3. The grounds relied on are as follows:
  1. That the Appellant is dissatisfied with the judgment and has lodged an arguable appeal;
  2. That execution may result in irrecoverable loss;
  3. That the Respondent may not be in a position to refund the decretal sum if the appeal succeeds;



4. That the Appellant, being under liquidation, is willing to deposit security as guided by the [Insolvency Act](#);
4. On 17<sup>th</sup> March 2025, the Court granted the Appellant a temporary stay of execution, on condition that it deposits KES 600,000 as security.
5. The Respondent opposed the application through a replying affidavit sworn by David Moriasi, learned counsel, raising the following grounds:
  1. That the Appellant has not demonstrated substantial loss;
  2. That the Respondent is financially capable of repaying the decretal sum if the appeal succeeds;
  3. That no execution has commenced;
  4. That granting stay would delay the Respondent's enjoyment of the fruits of its judgment;
  5. That while not opposed to conditional stay, the entire decretal sum should be deposited in a joint interest-earning account.
6. Subsequently, by notice of motion dated 25<sup>th</sup> March 2025, the Appellant sought to review the order requiring the deposit of KES 600,000 and instead proposed to deposit KES 185,091, citing this as the maximum percentage payable to unsecured creditors under its liquidation scheme, being 7.61% of the decretal sum.
7. Both applications were listed together for hearing. The Respondent did not file a response to the second application. Nonetheless, the absence of a replying affidavit does not bar the Court from considering and determining the application on its legal and factual merits.

### **Issues for Determination**

8. I have considered both applications and the issues that arise for determination are:
  1. Whether the Appellant has met the threshold for stay of execution under Order 42 Rule 6;
  2. Whether the Appellant's liquidation status and proposed security of KES 185,091 is sufficient;
  3. What orders should be made on security and costs.
9. An applicant who seeks the discretionary relief of stay of execution pending appeal bears the burden of satisfying the three cumulative conditions stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules. These requirements are designed to balance the competing interests of an appellant seeking to preserve the subject matter of the appeal, and a successful litigant entitled to the fruits of their judgment.
10. First, the applicant must demonstrate that substantial loss may result if the stay is not granted. This is the cornerstone of any stay application. The loss contemplated must be real, tangible, and such as would render the appeal nugatory if execution proceeds.
11. Secondly, the application must be brought without unreasonable delay. Timeliness is essential to ensure that the discretionary power of the court is not invoked as an afterthought or for purposes of delaying justice. The Court must be satisfied that the application was made promptly upon delivery of the impugned decision and that any delay, if present, is explained satisfactorily.
12. Thirdly, the applicant must offer security for the due performance of the decree or order as may ultimately be binding. The nature and adequacy of the security offered must be sufficient to assure



the court that the decree holder will not suffer prejudice in the event the appeal fails. The underlying rationale is that the right of appeal must be balanced against the right of the decree holder to enjoy the fruits of their judgment without undue risk.

13. These principles have been consistently affirmed by the superior courts, including the Court of Appeal in *Kenya Shell Ltd v Benjamin Karuga Kibiru* [1986] KLR 410 and *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, where the courts emphasized that failure to satisfy any of the three conditions disentitles an applicant from relief under this provision.
14. The impugned judgment was delivered on 27<sup>th</sup> January 2025 and this application was filed on 13<sup>th</sup> March 2025, approximately six weeks thereafter. In the circumstances, the delay though unexplained, is not inordinate and has not been shown to have occasioned any prejudice to the Respondent. The Court is satisfied that the application was brought without unreasonable delay, within the meaning of Order 42 Rule 6(2)(b) of the Civil Procedure Rules.
15. The Appellant proposes to deposit KES 185,091, representing 7.61% of the decretal sum of KES 6,785,072, as security for the due performance of the decree. The Appellant contends that this percentage corresponds to the projected dividend payable to unsecured creditors in insolvency and relies on its placement under administration as justification for capping the security at this amount.
16. The Court finds this position to be misconceived and legally untenable for the reason that whereas the *Insolvency Act*, particularly Section 430(1), imposes restrictions on execution and other legal processes against companies in liquidation without leave of the court, it does not relieve such companies from the obligation to provide meaningful security where they seek the equitable remedy of stay of execution.
17. In *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, the Court of Appeal emphasized that:

“The security must be one which will achieve due performance of the decree which may ultimately be binding on the applicant.”
18. It is therefore important to emphasize that the Court’s discretion to grant a stay of execution is an equitable power that must be exercised judiciously, not indulgently. This discretion is not intended to serve as a shield against lawful claims or to insulate judgment debtors from the ordinary consequences of litigation. Although insolvency or administration may impact the applicant’s financial position, it does not absolve them from non-compliance with the mandatory requirement under Order 42 Rule 6(2)(c). The security must be sufficient, not symbolic, and must reasonably assure the decree-holder of the due performance of the decree should the appeal fail. Weakening this requirement would compromise the integrity of the appellate process and the rights of a successful litigant.
19. The fact of the Appellant’s insolvency heightens, rather than reduces, the need for substantial security. To permit a deposit of KES 185,091 against a judgment of over KES 6.7 million would not only defeat the objective of Order 42 Rule 6, but also expose the Respondent to undue risk and render the appeal a tool for delay.
20. From the foregoing, this court is satisfied that a conditional stay is warranted to safeguard the rights of both parties.
21. Accordingly, the court makes the following orders:
  1. Stay of execution of the judgment delivered on 27<sup>th</sup> January 2025 in Milimani MCCC E1422 of 2022 is granted pending hearing and determination of the appeal on condition that the Appellant, shall deposit the entire decretal sum of KES 6,785,072 into an interest-earning joint account in the names of counsel for the parties



2. In default of compliance with Order (1) above, the stay shall automatically lapse
3. Mention before the Deputy Registrar on 04<sup>th</sup> July 2025 to confirm the filing and service of the record of appeal
4. Costs of this application shall abide the outcome of the appeal.

**DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MAY 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ruth

For Appellant - Ms. Mabango for Andrew & Steve Advocates

For Respondent - Ms. Nyata for Diro Advocates LLP

